It was held that the Commission was without power to make an order on such a basis, not because of any prohibitive provision in the Act, but merely because the majority of the court thought that Congress could never have intended the Commission to have such power. Conjecture as to the intent of the legislature which cannot be gathered from the words used is always a dangerous method of statutory construction.[3] But even though the intent of the legislature be looked into in this instance, as the principle of equalizing advantages (which is merely a phase of the principle of charging what the traffic will bear) [4] has been widely used by the railroads and has been an important factor in the development of the country,[5] it is extremely improbable that such a principle of rate making was not in the minds of the legislature when the Act was passed. In fact, section 3 of the Act is directed against abuse of its exercise by undue discrimination between localities.[6]

Nor is there any rule of law opposed to this theory of rate making. Members of the Commission have at times expressed opinions against it,[7] but rates adopting it are upheld by the courts.[8] Moreover, the argument that the power of making rates on this theory cannot safely be entrusted to private hands [9] does not apply to a rate made by the Commission. So that even if the courts have jurisdiction to review an order of the Commission based on a misconception of the law,[10] there would be no such jurisdiction in this case. Whether the principle of rate making under discussion is a sound one, is another question. Some writers, instead of condemning it, regard it, if properly applied, as the only practical system.[11] But the solution of the economic problem of devising a proper rate-making scheme should lie with the legislature rather than with the courts; and it has often been pointed out that the members of the Interstate Commerce Commission, in the performance of their function of fixing rates, are legislators.[12]

PROMISES TO ANSWER FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER. — Under the English Statute of Frauds, which has been gen-

---

to as an application of the rule that the through rate for the long haul should be less than the run of the locals for the two short hauls.

[3] 2 Sutherland, Statutory Construction, 2 ed., § 388.

[4] Beale & Wyman, Rate Regulation, § 486.

[5] Noyes' American Railroad Rates, p. 55.

[6] 3 U. S. Comp. St. 1901, p. 3155.

[7] Freight Bureau of the Cincinnati Chamber of Commerce *v.* Cincinnati, New Orleans & Texas Pacific Ry. Co., 7 Int. Com. Rep. 180; In the Matter of Export Rates from Points East and West of the Mississippi River, 8 Int. Com. Rep. 185.

[8] Texas & Pacific Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 197; Interstate Commerce Commission *v.* Southern Ry. Co., 122 Fed. 800.

[9] See 20 HARV. L. REV. 521.

[10] This jurisdiction was taken in Stickney *v.* Interstate Commerce Commission, 164 Fed. 638; Missouri, Kansas & Texas Ry. Co. *v.* Interstate Commerce Commission, 164 Fed. 645. But the jurisdiction of the courts to review these orders, except on constitutional grounds, is doubtful. For a discussion of this question see 32 Nat. Corp. Rep. 877.

[11] Noyes' American Railroad Rates, p. 55.

[12] See Interstate Commerce Commission *v.* Cincinnati, New Orleans & Texas Pacific Ry. Co., 167 U. S. 479; Interstate Commerce Commission *v.* Alabama Midland R. R. Co., 168 U. S. 144; Southern Pacific Co. *v.* Colorado Fuel & Iron Co., 101 Fed. 779. But see 23 HARV. L. REV. 12.

erally re-enacted in the United States, a promise to answer for the debt, default, or miscarriage of another is required to be in writing.[1] From the multitude of decisions which have endeavored to define the nature of such a promise, commonly known as a guaranty, certain well-defined rules may be deduced. (1) The promise must be collateral to some liability on the part of a principal. Hence if the alleged principal is not or cannot become liable,[2] or if the primary obligation is extinguished or novated by force of the secondary promise,[3] there is no guaranty. (2) The default of the principal must be a condition precedent to the promisor's liability.[4] Where, therefore, the facts show that the absolute liability of the promisor was contemplated, the statute does not apply. It makes no difference that such absolute liability might be discharged on payment by some other obligor.[5] (3) The primary and secondary obligations must be co-extensive and of a similar nature. Accordingly, if they give rise to different causes of action, if the measure of damages is different, or if the default and liability respectively may occur at different times, there is no promise to answer for the debt of another.[6] (4) The promisor must have a right to be reimbursed by the primary obligee; otherwise the substance of guaranty is lacking.[7] So, whenever the promisor has received consideration from the primary obligor, as in the case of a promise for the benefit of the creditor, his oral promise should bind him.[8] This class of cases should be carefully distinguished from another in which, although all the elements of guaranty are present, the large majority of courts take the promise out of the Statute of Frauds, on the ground that some new benefit has passed from the creditor to the promisor.[9] This almost universal rule was recently followed in *Bank of Pike* v. *People's National Bank*, 188 N. Y. Supp. 641.

It is true that whenever some benefit moves to the promisor, there is less danger of the fraud against which the statute was directed. But a doctrine which excludes from the operation of the statute cases which clearly come within its language, must be recognized as creating an exception by judicial legislation.[10] And since some consideration is required for a guaranty, the mere presence of consideration cannot make absolute a promise endowed with all the requisites of a guaranty. The force of this argument is recognized at least to the extent of refusing, as the majority of the courts do, to bring within the exception to the statute cases where the benefit of the consideration moves to one other than the promisor.[11]

---

[1] Stat. 29 Charles II, chap. 3.

[2] Chapin *v.* Lapham, 20 Pick. (Mass.) 467; Mease *v.* Wagner, 1 McCord (S. C.) 395.

[3] Bird *v.* Gammon, 3 Bing. N. Cas 883; Palmetto Co. *v.* Anderson, 123 Ga. 798.

[4] Gibbs *v.* Blanchard, 15 Mich. 292; National Bank *v.* State Bank, 93 Ia. 650.

[5] Lakeman *v.* Mountstephen, 7 Eng. & Ir. App. 17. A promise to indemnify is for this reason held not to fall within the statute. Wildes *v.* Dudlow, L. R. 19 Eq. 198.

[6] Bushell *v.* Beavan, 1 Bing. N. Cas. 103; Tolman *v.* Rice, 164 Ill. 255; Dock *v.* Boyd, 93 Pa. 92.

[7] Lichty *v.* Moore, 38 Neb. 269; Hall *v.* Trust Co., 220 Pa. 485.

[8] Barker *v.* Bucklin, 2 Denio (N. Y.) 45; Botkin *v.* Land Co., 23 Ky. L. Rep. 1964.

[9] Sutton *v.* Grey, [1894] 1 Q. B. 285; Raabe *v.* Squier, 148 N. Y. 81. *Contra*, Dillaby *v.* Wilcox, 60 Conn. 71, 80; Fullam *v.* Adams, 37 Vt. 391. See also Byrd *v.* Hickman, 48 So. 669 (Ala.).

[10] Small *v.* Shaefer, 24 Md. 143; Davis *v.* Patrick, 141 U. S. 479.

[11] *Contra*, Davis *v.* Patrick, *supra;* Howell *v.* Harvey, 64 S. E. 249 (W. Va.).

But that the consideration inures to the benefit of the promisor should be no answer to the defense of the statute: its sole importance is as showing whether the parties contemplated an absolute or a collateral liability.[12] However, in requiring that the consideration move from the creditor and that it also be a benefit to the promisor, the courts are recognizing the elements of a quasi-contractual right. In the case to which the exception to the statute may be traced there is a suggestion of a quasi-contractual right, and in it, as in many of the later decisions, it is to be noticed that the amount of recovery in quasi-contract would have exactly equalled the amount recovered on the oral promise.[13] Yet even if it would have been considerably less than the recovery on the promise, full justice would nevertheless have been done by restricting the promisee to a recovery back of the benefit unconscionably retained by the promisor. In a number of decisions a tendency toward a stricter observance of the statute is noticeable.[14] And it is doubtful whether the courts will allow recovery on the oral promise in cases where the default for which the promise answers is considerably larger than the benefit acquired by the promisor.[15]

THE DOCTRINE OF EQUITABLE ELECTION. — Broadly stated the doctrine of equitable election is that "he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it." [1] The typical application of this rule is where a testator purports to leave to B property belonging to A and in the same instrument gives property to A. Equity will put A to his election either to adopt the benefit received under the will, losing all claim to his own property left to B, or to take against the will, retaining such property.[2] In the latter case, though by the better authority the gift is not wholly forfeited,[3] equity will sequester the benefits received under the will, for the compensation of the disappointed donee.[4] But the party bound to elect is entitled to a bill to ascertain the relative values of the two gifts.[5] Originally derived from the civil law,[6] the doctrine is now applied to deeds as well as wills.[7] Its foundation is commonly said to be the intention of the maker of the instrument, in furtherance of which equity implies a condition to the valid gift.[8] To imply such a condition when the testator knowingly disposes of property belonging to one of the beneficiaries under the will, seems in truth to be carrying out his intent. But the fact that the doctrine applies with equal force when the property

---

[12] See 4 HARV. L. REV. 290.
[13] Williams *v.* Leper, 3 Burr. 1886; Wooten *v.* Wilcox, 87 Ga. 474.
[14] *Cf.* White *v.* Rintoul, 108 N. Y. 222, 227; Carleton *v.* Floyd, 192 Mass. 204.
[15] National Bank *v.* Smith, 107 Wis. 574; Lang *v.* Henry, 54 N. H. 57, 61.

[1] 2 Jarman, Wills, 5 Am. ed., § 1.
[2] Noys *v.* Mordaunt, 2 Vern. 581. See 18 HARV. L. REV. 302.
[3] Gretton *v.* Haward, 1 Swanst. 409; Van Dyke's Appeal, 60 Pa. St. 481, 492. *Contra*, Sugden, Powers, 8 ed., § 576.
[4] Gretton *v.* Haward, *supra;* Brown *v.* Brown, 42 Minn. 270.
[5] See Douglas *v.* Douglas, L. R. 12 Eq. 617, 637.
[6] Story, Eq. Jur., 13 ed., § 1078.
[7] Moore *v.* Butler, 2 Sch. & Lef. 249, 266; Barrier *v.* Kelly, 82 Miss. 233.
[8] Dillon *v.* Parker, 1 Swanst. 359, note, 401.